

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KYLE PETERSEN,

Plaintiff,

v.

ANTHONY SIMS, JR.,

Defendants.

Case No. 1:20-cv-00884-DAD-EPG (PS)

ORDER TO SHOW CAUSE WHY THE
ACTION SHOULD NOT BE
DISMISSED FOR FAILURE TO SERVE,
FOR FAILURE TO COMPLY WITH
THE COURT'S ORDER TO SUBMIT
DOCUMENTS FOR SERVICE, AND
FOR FAILURE TO PROSECUTE

(ECF NO. 23)

TWENTY-ONE (21) DAY DEADLINE

Plaintiff Kyle Petersen is a federal inmate proceeding *pro se* and *in forma pauperis* in this civil rights action filed pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Plaintiff filed his complaint on June 25, 2020, alleging that Defendant Anthony Sims, Jr., a special agent and computer forensic specialist employed by Homeland Security Investigations, violated his Fourth Amendment rights by reanalyzing, pursuant to a search warrant, forensic images obtained from his cell phones that had previously been ordered suppressed in his underlying criminal case. (ECF No. 1, p. 1-3). Thereafter, this case was stayed until the Ninth Circuit resolved Plaintiff's underlying criminal appeal (ECF No. 15), with this Court screening the complaint after the Ninth Circuit affirmed, *see United States v.*

1 *Peterson*, 995 F.3d 1061 (9th Cir. 2021), (ECF No. 23). In the July 7, 2021 screening order, the
 2 Court concluded that Plaintiff stated a cognizable Fourth Amendment claim against Defendant
 3 Anthony Sims, Jr. (ECF No. 23). Accordingly, the Court ordered the Clerk to send, and for
 4 Plaintiff to return within 30 days of service of the order, certain completed documents
 5 necessary to achieve service. (*Id.* at 6). The Court warned Plaintiff that “[f]ailure to comply
 6 with this order may result in the dismissal of this action.” (*Id.* at 7).

7 More than 30 days have passed, and Plaintiff has failed to submit the required
 8 documents or otherwise respond to the Court’s order. Without the required documents, the
 9 United States Marshals Service cannot serve Defendant Sims and this case cannot proceed.
 10 Plaintiff’s failure to initiate service likewise implicates Federal Rule of Civil Procedure 4(m),
 11 which provides as follows: “If a defendant is not served within 90 days after the complaint is
 12 filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action
 13 without prejudice against that defendant or order that service be made within a specified time.”
 14 Fed. R. Civ. P. 4(m). However, “if the plaintiff shows good cause for the failure, the court
 15 must extend the time for service for an appropriate period.” *Id.*

16 “Rule 4(m) applies to *pro se* litigants as well.” *Johnson v. State of Nevada*, No. 2:14-cv-
 17 01425-GMN-PAL, 2016 WL 6154892, at *2 (D. Nev. Oct. 20, 2016). While Plaintiff might
 18 normally be “entitled to rely on the U.S. Marshal for service of the summons and complaint” in
 19 complying with Rule 4(m), he cannot do so where he has failed to “provide[] the necessary
 20 information to help effectuate service.” *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990).
 21 Here, the 90-day period from service of the Court’s July 7, 2021 order (ECF No. 9) is
 22 approaching—approximately October 5, 2021, with no information yet provided by Plaintiff
 23 for the U.S. Marshal to even attempt service. *See Taylor v. San Bernardino Cty. Sheriff*, No.
 24 EDCV 09-404-MMM-MAN, 2010 WL 5563843, at *1 n.1 (C.D. Cal. Aug. 27, 2010), *report*
 25 *and recommendation adopted*, No. 09-00404-MMM-MAN, 2010 WL 5564049 (C.D. Cal. Dec.
 26 31, 2010) (starting Rule 4(m) deadline (formerly 120 days) from the date of the court’s order
 27 authorizing the U.S. Marshal to effect service of process on the plaintiff’s behalf). Accordingly,
 28 Plaintiff’s failure to serve and comply with this Court’s order to provide service documents is

1 delaying the prosecution of this case.

2 Local Rule 110, corresponding to Federal Rule of Civil Procedure 11, provides that
3 “[f]ailure of counsel or of a party to comply with . . . any order of the Court may be grounds for
4 the imposition by the Court of any and all sanctions . . . within the inherent power of the
5 Court.” “District courts have inherent power to control their dockets,” and in exercising that
6 power, a court may impose sanctions, including dismissal of an action. *Thompson v. Housing*
7 *Auth. of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986). A court may dismiss an action with
8 prejudice based on a party’s failure to prosecute an action, failure to obey a court order, or
9 failure to comply with local rules. *See e.g., Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th
10 Cir. 1992) (dismissal for failure to comply with an order requiring amendment of complaint);
11 *Malone v. U.S. Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to
12 comply with a court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986)
13 (dismissal for failure to prosecute and to comply with local rules).

14 Accordingly, Plaintiff is ORDERED to show cause why this action should not be
15 dismissed for his failure to serve, failure to comply with this Court’s order to provide service
16 documents, and failure to prosecute.

17 Plaintiff is ordered to file a written response to this order to show cause indicating
18 whether he intends to pursue this action and explaining his failure to submit service documents
19 by the required date. Alternatively, Plaintiff may submit the required documents. Any such
20 response shall be filed no later than twenty-one (21) days after the date of service of this order.
21 Plaintiff is cautioned that failure to respond to this order as set forth above may result in the
22 dismissal of this action.

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1 To assist Plaintiff with complying with this order, the Clerk is directed to mail Plaintiff
2 a courtesy copy of the Court's July 7, 2021 order (ECF No. 23) along with the documents
3 necessary to achieve service that are identified in that order.
4 IT IS SO ORDERED.

5 Dated: **August 16, 2021**

/s/ Eric P. Grogan
6 UNITED STATES MAGISTRATE JUDGE
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